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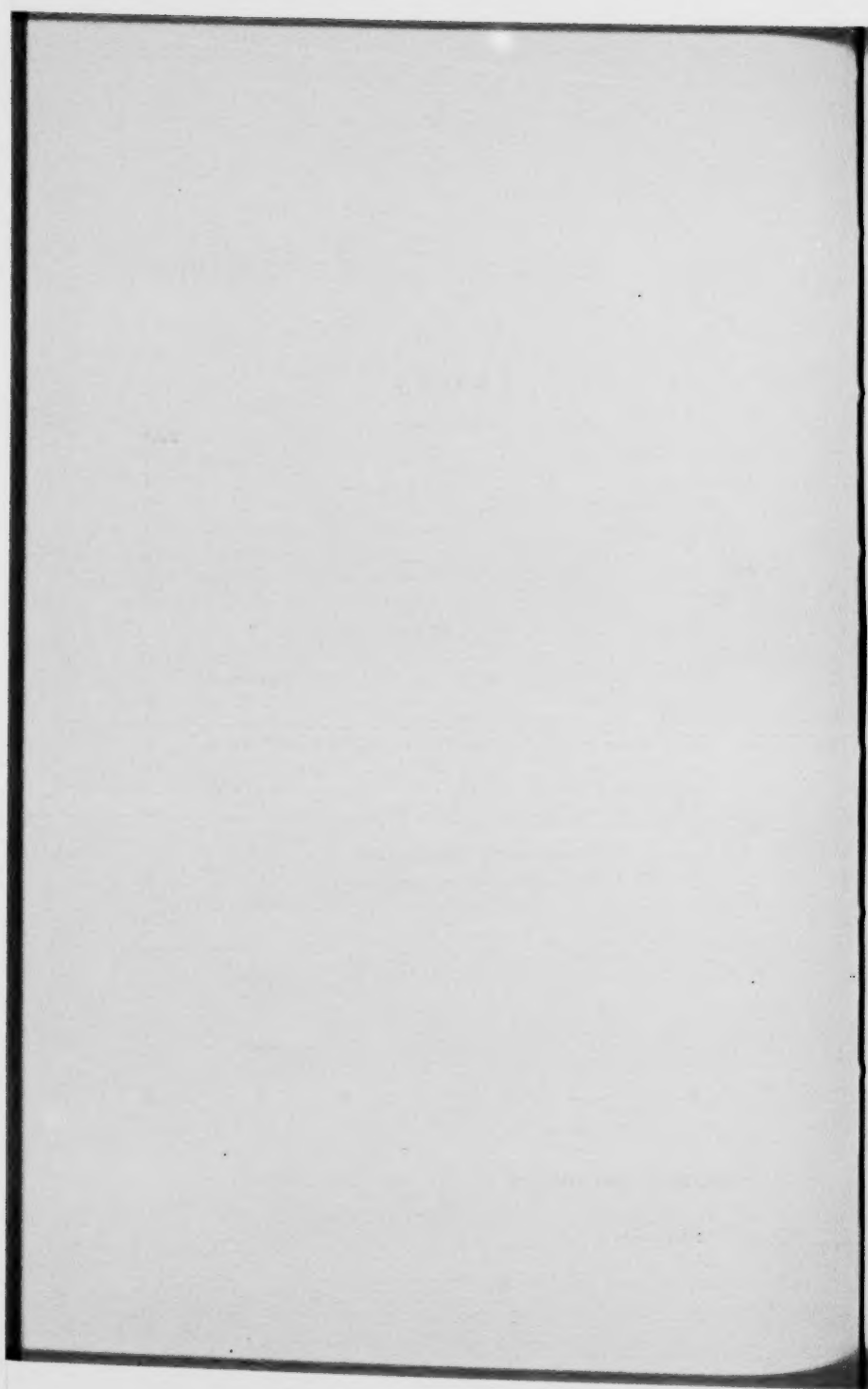
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(1)



# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 111

HARRY F. DOYLE AND LUCY J. DOYLE (HUSBAND  
AND WIFE), PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 20-30) is reported in 39 B. T. A. 940. The opinion of the Circuit Court of Appeals (R. 74-77) is reported in 110 F. (2d) 157.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 21, 1940 (R. 78). A petition for rehearing was denied on March 21, 1940 (R. 78).

The petition for writ of certiorari was filed May 28, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Petitioners in 1929 contracted to sell certain real estate for \$185,000. The vendee paid \$35,000 in 1929 and \$25,000 in 1930. In 1931 the vendee defaulted on the contract, refusing to make further payment. A suit for specific performance instituted by petitioners resulted in a decision in 1934 that petitioners were not entitled to specific performance but that they need not restore the payments received from the vendee in 1929 and 1930.

The question presented is whether petitioners realized taxable income in 1934 in the amount of these payments.

#### STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

##### SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or

the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

\* \* \* (U. S. C., Title 26, Sec. 22).

#### STATEMENT

The petitioners, husband and wife, purchased a house in New York City in 1903 for \$17,000, with title taken in the name of the wife. The value on March 1, 1913, was claimed by the petitioners to be \$90,000. This was controverted by the Commissioner, and no value as of that date was proved (R. 21, 30).

In 1929 the wife made a contract to sell the house to Tishman Realty and Construction Company for \$185,000. Of the purchase price, \$35,000 was paid at the signing of the contract in 1929; \$10,000 was to be paid by the purchaser by assuming a mortgage in that amount against the premises; the balance, \$140,000, was to be paid upon delivery of deed at the date set for closing, June 10, 1930. The contract provided that the purchaser might have an extension of the closing date to June 10, 1931, on payment of a further sum of \$25,000 on or before June 10, 1930. The petitioners remained in possession of the property. In June 1930 the Tishman Company availed itself of the right to the extension and paid the agreed \$25,000 (R. 21-22).

On the day fixed for closing, in June 1931, the petitioners tendered a proper deed and demanded

payment of the balance of the purchase price, \$115,000. The Tishman Company pretended that the title was defective and refused to go through with the sale. The petitioners directed their lawyer to bring suit for specific performance. The lawyer delayed in the hope of a settlement, but finally, in February 1933, brought suit for specific performance, demanding that the Tishman Company be compelled to pay the \$115,000 balance against delivery of deed. The Tishman Company defended on the merits and made counterclaim for the \$60,000 that had been paid. The case was tried and, in 1934, the court dismissed both the complaint and the counterclaim. The court held that the purchaser's objections to the title were pretences made in an effort to get out of a bad bargain, but denied specific performance because of the delay in commencing suit (R. 22-25, 29).

Accordingly the petitioners were left with the real estate and the \$60,000 received on account of the purchase price. The Commissioner took the view that the \$60,000 was income for 1934, and determined a tax deficiency for 1934. The petitioners asserted that the \$60,000 was income in prior years (R. 25, 26, 27). During the years 1929-1934, inclusive, petitioners' income-tax returns were made upon a cash-receipts-and-disbursements basis (R. 27).

The Board of Tax Appeals approved the determination of the Commissioner (R. 30), and the court below affirmed (R. 77).

## ARGUMENT

1. In 1929 and 1930, when the controverted payments were received, and in 1931, when the breach occurred, it was impossible to classify them properly for tax purposes. On the theory that they represented advance payments of the purchase price, no tax would be due until the sale was consummated and an amount was received by the vendors in excess of their capital investment or statutory basis. If the contemplated sale resulted in a profit, such profit would be taxable only when and to the extent that the payments received exceeded the basis of the property sold. *Burnet v. Logan*, 283 U. S. 404. If, however, the vendee wrongfully refused to close the deal, the vendors might become entitled to the payments made without any offsetting loss of capital assets, in which event the payments would be taxable as income in their entirety. But, until the sale was consummated, or in case of breach until the rights of the parties were established, it could not be determined into what category the payments would fall.

It is the position of the Government, sustained by the findings of the Board of Tax Appeals and approved by the court below, that the true status of the payments could not be determined until 1934. They could not be taxed as income in the years of actual receipt, 1929 to 1930, for they were then being held as part of the purchase price of a capital asset, the basis of which (presumably March 1,



1913, value in this case) the vendors were entitled to receive in full before subjection to tax. They could not be taxed in 1931, the year of the asserted breach by the vendee, because the vendors did not then elect to declare the contract forfeited, as they might have done. Instead, the vendors insisted on closing the deal and subsequently filed suit for specific performance, which terminated in 1934. It was then for the first time possible to determine the status of the payments. Cf. *Virginia Iron, Coal & Coke Co. v. Commissioner*, 99 F. (2d) 919 (C. C. A. 4th), certiorari denied, 307 U. S. 630.

2. As a primary reason for granting the writ, the petitioners assert (Pet. 6) a direct conflict with *Commissioner v. North Jersey T. Ins. Co.*, 79 F. (2d) 492 (C. C. A. 3d). There the taxpayer contracted in 1927 to sell certain property and received a down payment upon entering into the contract. In 1928 a court decreed specific performance and the balance of the purchase price was paid by the vendee in that year. The taxpayer was on the accrual basis of accounting, and the question presented was whether the profit realized upon the sale should be ascribed to the year 1927 or to the year 1928. That case did not involve the question, here presented, as to the effect of a subsequent judicial determination which for the first time converts into profit what had previously been merely a return of capital. That case turned primarily upon the Board's finding of fact that the contract, from the

taxpayer's point of view, was fully executed in 1927, and that the liability of the purchaser was then unconditional. Since the taxpayer was on the accrual basis, the profit to be derived from this unconditional liability became accrued income in that year. The taxpayers in the case at bar were on the cash receipts and disbursements basis, and this factor alone is sufficient to distinguish the cases. In the *North Jersey* case the court was not concerned with the classification or status of the cash payment. The entire purchase price became accrued income in 1927, and the margin of profit to be taxed as income could therefore be determined at that time.

The further contention (Pet. 8) that the decision of the court below is in direct conflict with *Baird v. United States*, 65 F. (2d) 911 (C. C. A. 5th), certiorari denied, 290 U. S. 690, is likewise unfounded. There, as here, a large cash payment had been made at the time the sales contract had been signed in 1919. On the failure of the purchaser to pay an additional sum called for in the succeeding year, the seller had the right to claim the down payment forfeited. The court concluded that since the seller had, in January 1921 (before the filing of his income-tax return for 1920), instituted a suit for the cancellation of the contract because of the failure to pay the additional sum, the payment received in the prior year (1919) thereupon assumed the status of income for the succeed-

ing year (1920). The court there recognized that the payment could not be classified as income in the year in which it was actually received but decided that upon the facts presented, the status became fixed in the succeeding year when, following the default, the seller elected to declare the payment forfeited. It is to be noted that, in the case at bar, the court conceded that (R. 76) if the petitioners had elected to exercise their legal right to treat the transaction as ended, the status of the payments as income might have been fixed in 1931. However, under the findings of fact by the Board (R. 21-27), such was not the case here.

Petitioners also assert (Pet. 6-7) that the decision below is in conflict with *North American Oil v. Burnet*, 286 U. S. 417. That case, however, involved *earnings* that were received during the taxable year and were subject to the unrestricted use of the taxpayer. The Court simply held that the mere fact that there was outstanding a claim of right to those earnings in a third person did not deprive them of their quality as earnings when received. Here, on the other hand, the down payments constituted merely a return of capital until their status was otherwise determined in 1934. The other decisions likewise asserted to be in conflict with the decision below (Pet. 11-12) are similarly distinguishable.

## CONCLUSION

There is no conflict of decisions, and the decision below is correct. The petition should be denied.

Respectfully submitted.

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JUNE 1940.